(5)

No. 85-863

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUBRIZOL ENTERPRISES, INC.,

Petitioner,

v.

ROBERT A. CANFIELD, BANKRUPTCY TRUSTEE FOR RICHMOND METAL FINISHERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF IN OPPOSITION

JAMES R. SHEERAN
2311 East Broad Street
Richmond, VA 23223
(804) 643-3570

Counsel For Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

8 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT 1

SUMMARY OF ARGUMENT 1

REASONS A WRIT SHOULD NOT BE GRANTED:

1. Lubrizol Raises an Issue on Appeal not Heard in the Court Below 1
2. Rejecting the Subject Licensing Agreement Does Not Rescind a Property Transfer 2
3. The Decision of the Court Below Does Not Raise a New Issue That Must be Settled by This Court 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES:	Page
Carlson v. Green, 446 U.S. 14 (1980)	2
N.L.R.B. v. Bildisco and Bildisco, ___ U.S. ___, 104 S.Ct. 1188 (1984)	4, 5

STATUTES:

11 U.S.C. 365 ..... *passim*

STATEMENT

Respondent agrees with the Statement of material facts and relevant proceedings in the courts below as supplied by the Petitioner.

SUMMARY OF ARGUMENT

1. Lubrizol has raised in its petition for *certiorari* for the first time the contention that the subject licensing agreement constituted a sale of the technology by RMF. That issue was not raised by Lubrizol in any court below, and should not be raised for the first time in this Court.

2. Rejection of the licensing agreement neither rescinds a contract, nor deprives Lubrizol of any proprietory interest in property. Rejection merely terminates a right of use, as would be the result if a debtor landlord rejected a tenant's lease.

3. This case does not raise an important issue of federal law. Licensing agreements are the type Congress contemplated could be rejected under Section 365.

REASONS A WRIT SHOULD NOT BE GRANTED

1. Lubrizol Raises an Issue on Appeal not Heard in the Court Below.

Lubrizol contends on brief that the Technology Licensing Agreement concluded a sale by RMF to Lubrizol of the technology. Petitioner's Brief, p. 6, note 5.

At no time in any of the courts through which this litigation has traversed has Lubrizol ever contended

it purchased the technology from RMF. In fact, on the petition for rehearing and suggestion for rehearing Lubrizol filed in the court below, Lubrizol conceded that the subject technology licensing agreement was executory.

Therefore, since this issue was not raised in any court below, the Supreme Court of the United States should not grant the Petitioner a writ of *certiorari* for consideration of this issue. *Carlson v. Green*, 446 U.S. 14 (1980).

2. Rejecting the Subject Licensing Agreement Does Not Rescind a Property Transfer.

The thrust of and foundation for the assertion that an error of law has occurred is the mistaken belief of Lubrizol Enterprises, Inc. (Lubrizol) that the subject licensing agreement effected a pre-petition transfer of the proprietory interest of Richmond Metal Finishers, Inc. (RMF), in its metal finishing technology to Lubrizol. That assertion is now, and has been throughout the litigation in the Courts below, erroneous.

RMF never parted with its title to or ownership of the technology; Lubrizol contracted for nothing greater than the right to use the technology, and the use licensed was "non-exclusive" at that. No transfer of title or ownership to the technology ever passed from RMF to Lubrizol. The contract only authorized Lubrizol to use a part of RMF's entire right to make, use and vend the technology. Technology Licensing Agreement, Article II, Petitioner's Appendix, 55a. RMF never ceased to own the technology until its case became a Chapter 7 proceeding.

Therefore, Lubrizol is under a fundamental misconception as it analyzes the impact of Section 365 of

the Bankruptcy Code upon the rejected licensing agreement. This case is not, as Lubrizol would have the Court believe, about the divestiture of a proprietory interest in property; it is about the termination of a mere right of use.

Licensing agreements are more like leases than any other type of executory contract. The licensor is like a landlord who contractually grants his licensee/tenant a limited right to use his property for a specified purpose or purposes, over a stated term for certain consideration. Therefore, as the Court of Appeals below correctly noted, it is more accurate to analyze this case as though the licensing agreement were a lease to which RMF was the landlord and Lubrizol the tenant. Petitioner's Appendix, pp. 5a-6a, footnote.

Congress recognized that rejection of an executory contract or a lease under Section 365 could, under certain circumstances, strip a non-debtor party of limited rights to use property. If a landlord under a lease of real property who was in a Chapter 11 or Chapter 13 proceeding sought to reject a lease pursuant to Section 365, the effect of the rejection upon his tenant would be to deprive him of his right to continued use of the leased premises. Congress provided special protections for tenants of real properties whose leases were rejected, but absent those prophylactic provisions the rejecting landlord would recover his property for the unused term of the lease. Congress did not provide special protections for licensing agreements such as that at bar.

Rejection of the licensing agreement in this case does not deprive Lubrizol of any interest in property that was not contemplated by the drafters of the Bankruptcy Code. Lubrizol's interest in the technol-

ogy has never risen higher than a right of use, and that is an interest which Congress determined a debtor had the right to recover when it enacted Section 365. RMF has never sought the recovery of any manuals or other tangible property transferred to Lubrizol when the licensing agreement was executed; its sole object has been to terminate Lubrizol's right to use the technology.

3. The Decision of the Court Below Does Not Raise a New Issue That Must be Settled by This Court.

The decision of the Court of Appeals below does not raise any important issue of federal bankruptcy law which has not already been settled by this Court.

The subject of executory contracts, the power of a debtor to reject them under the Bankruptcy Code, and the expansive definition of executory contracts Congress adopted when enacting the Bankruptcy Code has previously been addressed by this Court. *N.L.R.B. v. Bildisco and Bildisco,* U.S. ___, 104 S.Ct. 1188 (1984). The language of the Code "includes all executory contracts except those expressly exempted . . . ." *Bildisco,* 104 S.Ct. at 1194. Licensing agreements are no where excluded from the operation of Section 365, and Congress knew how to draft exemptions from its operation. *Bildisco,* 104 S.Ct. at 1195.

Contrary to the arguments advanced by various *amici,* the licensing agreement is executory. Petitioner's Brief, 3, note 3. Additionally, a denial of *certiorari* will not hamper business or industry growth. It will simply mean that inventors will have

to sell technological advancements to developers who wish to limit their risks, and that developers will be denied the favorable tax advantages that flow from licensing. Developers can either take the risk of having inventors file bankruptcy and reject their licensing agreement, or limit their risk by purchasing a technology outright and paying a little more tax.

CONCLUSION

The petition for a writ of *certiorari* should be denied. The Petitioner did not raise in any court below the argument that it owned the subject technology. The decision of the Court of Appeals below neither expands the power of a debtor to reject a contract that is clearly executory, nor does it deprive the Petitioner of any proprietory interest in property.

Respectfully submitted,

ROBERT A. CANFIELD, TRUSTEE
JAMES R. SHEERAN
(Counsel of Record for Respondent)
2311 East Broad Street
Richmond, Virginia 23223
(804) 643-3570